Hong Leong Finance Bhd v Travers Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–224–2546 OF 2000
KAMALANATHAN RATNAM J
18 OCTOBER 2000

Land Law *— Charge — Notice of demand — Service of — Chargee's registered address changed without informing chargor — Onus on chargee to notify chargor of change of address — Whether good service*

Land Law *— Sale of land — Order for — 'Cause to the contrary' — Notice of demand and statutory notice lack details of arrears or the rate of interest for calculation of amount due — Whether failure to produce certificate when statement of accounts in affidavit was challenged amounted to cause to the contrary — Evidence Act 1950 s 90A(2)*

The plaintiff in this application applied for sale by public auction of six properties ('the properties') belonging to the defendant and charged to the plaintiff as security for a loan granted by the plaintiff to the defendant. The plaintiff sent a notice of demand to the defendant at the address stated in the loan agreement. There was a provision in the loan agreement which required the chargor defendant to notify the plaintiff in the event of a change of address. The notice of demand did not give any details of the arrears of instalments nor the rate of interest used for the calculation. Subsequently, the statutory notice pursuant to the National Land Code 1965 ('the NLC') with an accompanying letter was sent to the defendant stating that the defendant had failed to comply with s 3.01 of the annexure to the charge, ie the loan agreement and the notice of demand. Section 3.01 of the annexure was in general terms. The issues raised by the defendant were: (i) whether there was service of the notice of demand on the defendant as it had changed the address of its registered office; (ii) whether the plaintiff failed to allege specific breach; and (iii) whether production of a statement of accounts from the ledger of the plaintiff sufficed to proof the amount owing when the accuracy of these computerized accounts was being challenged by the defendant.

Held, dismissing the plaintiff's application with costs:

(1) Whilst the registered address could be changed, the parties specifically agreed that service of notices ought to be, in the case of the chargor defendant, at the address stated in the loan agreement and the onus was clearly on the defendant to notify the plaintiff of the change of address, of which the defendant failed to do. Hence, there had been proper service of both the notice of demand and the statutory notice of demand (see p 274C, E).

(2) Neither the notice of demand nor the statutory notice had worked out the specifics. The plaintiff had not clearly shown the breach

that the defendant was deemed to have committed. The notice of demand and statutory notice were vague and the defendant had shown 'cause to the contrary' under s 256(3) of the NLC (see p 275F–G).

(3) As the plaintiff had failed to produce a certificate under s 90A(2) of the Evidence Act 1950, the evidence of the statement of accounts from the ledger subjected to challenge must be disregarded. The defendant had again shown a 'cause to the contrary'. The need to comply with s 90A(2) of the Evidence Act 1950 must prevail over the Bankers' Book (Evidence) Act 1949 (see pp 275H–276A).

[**Bahasa Malaysia summary**

Plaintif di dalam permohonan ini memohon untuk menjual melalui lelongan awam enam hartanah ('hartanah tersebut') milik defendan dan digadaikan kepada plaintif sebagai jaminan kepada satu pinjaman yang diberikan oleh plaintif kepada defendan. Plaintif telah menghantar satu notis tuntutan kepada defendan di alamat yang dinyatakan di dalam perjanjian pinjaman. Wujud satu peruntukan di dalam perjanjian pinjaman tersebut yang menghendaki penggadai defendan untuk memberitahu plaintif sekiranya ada pertukaran alamat. Notis tuntutan tersebut tidak ada apa-apa butir-butir tentang tunggakan bayaran ansuran maupun kadar faedah yang digunakan di dalam pengiraan. Berkutnya, notis statutori menurut Kanun Tanah Negara 1965 ('KTN tersebut') dengan satu surat yang dilampirkan bersama telah dihantar kepada defendan menyatakan bahawa defendan telah gagal untuk mematuhi s 3.01 kepada lampiran tambahan terhadap gadaian tersebut, iaitu perjanjian pinjaman dan notis tuntutan. Seksyen 3.01 kepada lampiran tambahan tersebut adalah di dalam terma-terma umum. Isu-isu yang ditimbulkan oleh defendan adalah: (i) sama ada terdapat penyampaian notis tuntutan tersebut ke atas defendan kerana ia telah bertukar alamat pejabat berdaftarnya; (ii) sama ada plaintif telah gagal untuk mendakwa pelanggran yang spesifik; dan (iii) sama ada pengeluaran penyata akaun daripada lejar plaintif memadai untuk membuktikan jumlah yang perlu dibayar memandangkan ketepatan akaun-akaun berkomputer tersebut dicabar oleh defendan.

Diputuskan, menolak permohonanplaintif dengan kos:

(1) Walaupun alamat berdaftar boleh ditukarkan, pihak-pihak tersebut secara spesifik telah bersetuju bahawa penyampaian notis-notis sepatutnya, di dalam kes penggadai defendan, ke alamat yang dinyatakan di dalam perjanjian pinjaman dan beban tersebut dengan jelas terletak atas defendan untuk memberitahu plaintif tentang pertukaran alamat tersebut, di mana defendan telah gagal untuk berbuat sedemikian. Justeru itu, berlaku

penyampaian yang betul ke atas kedua-dua notis tuntutan dan notis statutori tersebut (lihat ms 274C, E).

(2) Kedua-dua notis tuntutan maupun notis statutori tdak menepati spesifikasi. Plaintif dengan jelas tidak menunjukkan pelanggaran bahawa defendan dianggap telah lakukan. Notis tuntutan dan notis statutori tersebut tidak jelas dan defendan telah menunjukkan 'sebab sebaliknya' di bawah s 256(3) KTN tersebut (lihat ms 275F–G).

(3) Memandangkan plaintif telah gagal untuk mengemukakan satu sijil di bawah s 90A Akta Keterangan 1950, keterangan penyata akaun daripada lejar yang tertakluk untuk dicabar mestilah tidak dipedulikan. Defendan sekali lagi telah menunjukkan satu 'sebab sebaliknya'. Keperluan untuk memenuhi s 90A Akta Keterangan 1950 mesti mengatasi Akta Buku Bank (Keterangan) 1949 (lihat ms 275H–276A).]

Notes

For cases on notice of demand, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1645–1659.

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3030–3102.

Cases referred to

Bank Utama (M) Bhd v Cascade Travel & Tours Sdn Bhd [2000] 4 MLJ 582 (refd)

Southern Finance Co Bhd v Zamrud Properties Sdn Bhd [1998] MLJU 87 (refd)

Legislation referred to

Bankers' Book (Evidence) Act 1949
Evidence Act 1950 s 90A(2)
National Land Code 1965 ss 254, 256(3), Form 16D, Form 19D

SY Ng (*Raja Darryl & Loh*) for the plaintiff.
RY Wong (*Dennis Nik & Wong*) for the defendant.

Kamalanathan Ratnam J:

Facts

This is the plaintiff's application for sale by public auction of six properties ('the said properties') belonging to the defendant and charged to the plaintiff as security for a loan of RM20m granted by the plaintiff to the defendant at the latter's request. A loan agreement dated 26 August 1996 was executed by the parties containing numerous terms and conditions. The plaintiff contended that the defendant had breached the terms of the

agreement and sent to the defendant a notice of demand dated 18 May 1999 and which is reproduced in full. It reads as follows:

> Travers Development Sdn Bhd
> Level 9, Grand Seasons Avenue
> No 72 Jalan Pahang
> 53000 Kuala Lumpur and/or,
>
> BY HAND/
> REGISTERED &
> ORDINARY POST
>
> 1st Floor, Wisma Equity
> No 150 Jalan Ampang
> 50450 Kuala Lumpur and/or,
>
> Lot 7.01, 7th Floor, Wisma Equity
> Jalan Ampang
> 50450 Kuala Lumpur
>
> 19 May 1999
>
> Dear Sirs
>
> Re: HONG LEONG FINANCE BHD Term Loan Facility of RM20m
>
> We act for Hong Leong Finance Bhd of Level 1, Wisma Hong Leong, 18 Jalan Perak, 50450 Kuala Lumpur who has granted you the abovesaid facility.
>
> 2 Our client instructs us that despite repeated demands you have failed, refused and/or neglected to pay the arrears of instalments due under the said facility.
>
> 3 Our client now wishes to recall the said facility. We are therefore instructed to demand from you which we hereby do the sum of RM22,878,092.83 which sum is due and owing from you as at 15 May 1999, computed as follows:
>
> | | |
> |---|---|
> | Balance outstanding as at 30 April 1999 | RM22,762,216.44 |
> | Interest from 1 May 1999 till 15 May 1999 | RM 114,746.50 |
> | Late payment interest from 1 May 1999 till 15 May 1999 | RM1,129.89 |
> | | RM22,878,092.83 |
>
> 4 TAKE NOTICE that should we fail to receive the aforesaid sum of RM22,878,092.83 together with a further sum of RM250 being our solicitors' costs herein incurred within seven (7) days hereof, we have our client's instructions to proceed with legal action against you without any further reference to you. In such event, our client holds you liable for all additional interest accrued together with costs and expenses incurred including all legal fees on a solicitor and client basis.
>
> Yours faithfully,
>
> Sgd.
> cc Guarantor — Chan Teik Huat
> Client (Ref: 154–38–00021–6)

When there was no response to the notice of demand the plaintiff's solicitors sent the statutory notice, the Form 16D, with an accompanying letter dated 9 May 2000. Both the letter and the Form 16D are reproduced as follows:

Travers Development Sdn Bhd BY HAND/
Level 9, Grand Seasons Avenue
No 72 Jalan Pahang
53000 Kuala Lumpur and/or,

Tingkat 1, Wisma Equity
No 150 Jalan Ampang
50450 Kuala Lumpur and/or,

Level 9, Grand Seasons Avenue
No 72 Jalan Pahang
53000 Kuala Lumpur and/or,

Lot 7.01, 7th Floor, Wisma Equity
Jalan Ampang
50450 Kuala Lumpur

9 May 2000

Dear Sirs

Re: HONG LEONG FINANCE BHD Charge over lands held under:

1 Geran No 25022 (dahulunya CT No 7101) Lot No 2 Sek 95 Bandar Kuala Lumpur
2 CT No 11006 (Geran No 29446) Lot No 48 Sek 95 Bandar Kuala Lumpur
3 CT No 11007 (Geran No 29445) Lot No 49 Sek 95 Bandar Kuala Lumpur
4 CT No11009 (Geran No 29444) Lot No 51 Sek 95 Bandar Kuala Lumpur
5 CT No 11580 (Geran No 28871) Lot No 59 Sek 95 Bandar Kuala Lumpur
6 CT No 11581 (Geran No 29443) Lot No 60 Sek 95 Bandar Kuala Lumpur

We act for Hong Leong Finance Bhd of Level 1, Wisma Hong Leong, 18 Jln Perak, 50450 Kuala Lumpur.

2 Pursuant to Section 254 of the National Land Code 1965, we enclose herewith a Notice in Form 16D by way of service on you.

Yours faithfully,

Sgd.
Encl
cc Client (Ref: 154-38-00021-6)

NATIONAL LAND CODE
FORM 16D
(Section 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To:

Travers Development Sdn Bhd
Level 10, Grand Seasons Avenue
No 72 Jalan Pahang
53000 Kuala Lumpur

A and/or

Tingkat 1, Wisma Equity
No 150 Jalan Ampang
50450 Kuala Lumpur

B and/or

Level 9, Grand Seasons Avenue
No 72 Jalan Pahang
53000 Kuala Lumpur

and/or
C Lot 7.01, 7th Floor, Wisma Equity
Jalan Ampang
50450 Kuala Lumpur

Chargor under the Charge described in the Schedule below of the land so described.

D WHEREAS you have committed a breach of the provisions of this Charge by failing to comply with Section 3.01 of the Annexure to this Charge and the letter of demand dated 18th May 1999 from the solicitors for the Chargee;

AND WHEREAS the breach has continued for a period of at least one (1) month prior to the date of this notice;

E WE as Chargee by virtue of the powers conferred by Section 254 of the National Land Code hereby require you within the period of one (1) month from the service of this notice to remedy the breach;

AND TAKE NOTICE that if you fail to remedy the breach within that period we shall apply for an Order of Sale.

F Dated this 9 May 2000.

Sgd
M/s Raja, Darryl & Loh
Advocates & Solicitors
18th Floor, Wisma Sime Darby
G Jalan Raja Laut
50350 Kuala Lumpur
for and on behalf of the Chargee
Hong Leong Finance Bhd

Findings of the court

H

Non-service of notice of demand

Mr Wong's first issue was that his client had not received the initial notice of demand dated 18 May 1999. The annexure to the charge being the loan agreement states the defendant's registered office as 1st floor, Wisma I Equity, No 150 Jalan Ampang, 50450 Kuala Lumpur ('the Ampang address'). Under s 8.22 of the loan agreement relating to service of notices the defendant's address was clearly stated to be the Ampang address. There

was also a provision requiring the chargor defendant to notify the plaintiff in writing by AR Registered post in the event of a change in address of the chargor, within seven days prior to such change. It would seem from the letter of demand dated 18 May 1999 that the Ampang address was the second address stated therein. The defendant, however, in its affidavit in reply stated that he had notified the Registrar of Companies on 26 January 1999 by way of Form 44, that its registered office as of 26 January 1999 would be at Level 10, Grand Seasons Avenue, No 72 Jalan Pahang, 53000 Kuala Lumpur ('the Jalan Pahang address').

To my mind, if the parties had not specifically stipulated the address for service of notices pursuant to s 8.22 of the loan agreement, the change of address of the registered office would have been a material factor in the defendant's favour. But whilst the registered address could be changed, the parties specifically agreed that service of notices ought to be, in the case of the chargor defendant, at the Ampang address and the onus was clearly upon the defendant to notify the plaintiff of the change of address.

The defendant pointed out that the Form 16D had been sent to the Jalan Pahang address. Whilst that may be so, I note that the Form 16D has also been sent to the Ampang address. Since the defendant has not exhibited any letter which it ought to have sent seven days prior to 26 January 1999, to the plaintiff notifying the plaintiff of the change of address, I hold that the defendant is solely to blame if it now contends it had not received the registered notice and the statutory notice. It is my judgment that there has been proper service of both the notice and the statutory notice of demand ('Form 19D'). In a similar situation I had said in *Southern Finance Co Bhd v Zamrud Properties Sdn Bhd* [1998] MLJU 87 as follows:

> I am of the view that whilst there may be various clauses in an agreement or a charge that might seem to speak at cross-purposes, however where the parties have shown their inclination to be jointly bound by a particular view, and more so in this case where the parties had, pursuant to cl 14.01, stipulated the correct address for service of both the chargor and chargee it was the clear intention of the parties that those addresses alone and none other should be the proper addresses for service.

Failure to allege specific breach

The notice of demand dated 18 May 1999 states that the defendant had 'failed, refused and/or neglected to pay the arrears of instalments due under the said facility'. No details of the arrears of instalments nor the rate of interest used for the calculation had been stated. However, the statutory notice of demand states that the defendant had 'committed a breach of the provision of … s 3.01' of the annexure to the charge and the said Form 16D also refers to the incomplete notice of demand dated 18 May 1999. It is therefore necessary for me to reproduce s 3.01 of the annexure which reads as follows:

> SECTION 3.01 PAYMENT ON DEMAND
>
> (1) The Chargor will pay and satisfy the Lender on demand:

(a) in full all moneys which are owing and payable by the Chargor to the Lender under the Loan and pursuant to the Loan Agreement or such amount thereof as may be outstanding under the Loan Agreement including all the interests, costs and charges described thereunder and hereunder (hereinafter collectively referred to as 'the Indebtedness');

(b) the charges above-referred to include all bank charges, commission, all expenses which the Lender may in the course of its business charge to the Chargor and all cost, charges, disbursement, legal fees on a full indemnity basis which the Lender may incur in enforcing or seeking to obtain payment of all or any part of the sums owing to the Lender by the Chargor in respect of the Loan and to make good any default by the Chargor or its successors-in-title in payment of the said commission, interest charges or any part thereof and all other charges and disbursements in the preparation stamping or creating of this Charge and in the enforcement of the same against the Chargor;

(c) the interest payable above-referred shall include interest on outstanding sum calculated at the rate prescribed in the Loan Agreement or at such other rate as may be determined or varied by the Lender from time to time including additional interest on late payment and capitalized interest.

(2) The rights of the Lender to capitalize and charge interest as provided herein shall subsist and continue to subsist notwithstanding the issue and/or service of a demand for payment of any moneys intended to be hereby secured and shall be applicable both before and after judgment and notwithstanding that the relationship of financier and customer between the Lender and the Chargor shall have ceased for any reason or cause whatsoever.

(3) For the purpose of this Charge herein a demand for the payment of the moneys due hereunder shall be deemed to be made when the Lender gives to the Chargor a notice in writing in accordance with cl 8.22 hereof.

Now s 3.01 is in general terms. Neither the notice nor the Form 19D has worked out the specifics. I am satisfied that the plaintiff has not clearly shown the breach that the defendant is deemed to have committed. In this respect the notice and the Form 19D are vague and it is my judgment that the defendant has indeed shown 'cause to the contrary' under s 256(3) of the National Land Code 1965.

Statement of accounts from ledger

In support of its case, and to show details of the accounts, the plaintiff produced and exhibited to an affidavit, an extract from the computerized accounts. The defendant had challenged the accuracy of these computerized accounts in various affidavits on three specific occasions. Yet the plaintiff did not see the need to comply with s 90A of the Evidence Act 1950. In *Bank Utama (M) Bhd v Cascade Travel & Tours Sdn Bhd* [2000] 4 MLJ 582, I had on 22 June 2000 held that the need to comply with s 90A(2) of the Evidence Act 1950 must prevail over the Bankers' Books (Evidence) Act 1949 (the BBEA) since the plaintiff had failed to produce a

certificate under s 90A(2) of the Evidence Act 1950. I had said in that case at p 587 of the judgment as follows:

> Whilst s 2 no doubt says that the Act does not apply to affidavits and by virtue of the decision in it ought also not to apply to exhibits annexed to the affidavits, acceptance of the plaintiff's argument gives a too simplistic approach to the challenge raised by the defence. Whilst the Act does not apply to affidavits it does not mean that an affidavit by a living person can be admitted as evidence proprio vigore without the necessity of him taking the witness stand. In order for such evidence to be admissible it should be capable of being regarded as a statement falling under s 32 (cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant) or under s 73A (admissibility of documentary evidence in civil cases, etc) of the Act. Once a challenge is taken to the affidavit or to the exhibit annexed to it, then it must be properly proved. Therefore it is my judgment that s 2 does not assist the plaintiff in this case and the said documents must be properly proved pursuant to s 90A of the Act.

Coincidentally, the solicitors for the plaintiff herein were the same solicitors for the plaintiff in *Bank Utama*. I shall adopt the same reasoning herein and hold that the evidence of the statement of accounts from the ledger subjected to challenge must be disregarded and in the circumstances, I must hold that the defendant has yet again shown a 'cause to the contrary'.

I therefore have no hesitation in dismissing this application with costs.

Plaintiff's application dismissed with costs.

Reported by Moy Saw Han